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IN THE SUPREME COURT OF MISSOURI

No. SC92500

PEGGY NORTHCOTT and LARRY POTASHNICK,
Respondents/Cross Appellants,

v.

MISSOURI SECRETARY OF STATE ROBIN CARNAHAN and
MISSOURI STATE AUDITOR THOMAS A. SCHWEICH,
Appellants/Cross Respondents,

MISSOURIANS FOR RESPONSIBLE LENDING and JAMES BRYAN,
Appellants/Cross Respondents,

and

GEORGE SHULL AND JERRY STOCKMAN,
Appellants/Cross Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Judge

REPLY BRIEF OF RESPONDENTS/CROSS APPELLANTS NORTHCOTT AND POTASHNICK IN SUPPORT OF THEIR CROSS APPEAL

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ARGUMENT

I. THE PREPARATION OF A FISCAL NOTE AND FISCAL NOTE SUMMARY UNDER SECTION 116.175 IS NOT AN INVESTIGATION "RELATED TO THE SUPERVISING AND AUDITING OF THE RECEIPT AND EXPENDITURE OF PUBLIC FUNDS."

The Auditor admits that the last sentence of article IV, section 13 is limiting, but apparently only the portions that suit him. The Auditor states in his Second Brief (p. 21) that the question is whether preparation of a fiscal note is related to the receipt or expenditure of public funds. He conveniently omits the words immediately following not related to – the supervising and auditing of – the receipt and expenditure of public funds. To support the Auditor's argument, one would need to read the last sentence of Missouri Constitution article IV, section 13 as follows:

> No duty shall be imposed on him by law which is not related to ~~the supervising and auditing of~~ the receipt and expenditure of public funds.

These words cannot be ignored. Contrary to the Auditor's claim, the Constitution is clear that all duties assigned to the Auditor must be related to the supervising and auditing of the receipt and expenditure of funds. The Auditor opens his response by pointing to the phrase "investigations required by law" and says Northcott's construction reads these words out of the Constitution. Schweich's Second Br. at 17. To the contrary, the words "investigations required by law" allows the Auditor to do investigations so long as they are related to the auditing and supervising of state funds actually received or expended.

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For example, the Auditor may investigate as part of an audit or as the result of an audit. Cross Appellants have already fully briefed that fiscal note preparation is not a duty *of any kind* that is related to the supervising or the auditing of the receipt and expenditure of public funds. Taking the Auditor's argument to its logical conclusion, the inclusion of the phrase "investigation" in the Constitution allows the Auditor to be assigned duties of investigation in any context, *i.e.,* consumer or securities fraud, tax evasion, child abuse and neglect. The language of the provision and the intent of the voters in adopting the section are clear – the Auditor does not have a roving commission to investigate anything he would like. He is limited to the job of auditing. The words in the last sentence, "supervising or auditing," are not meaningless surplusage. *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 395 n.3, 4 (Mo. banc 1996). The issue for the Court is whether the Constitutional mandate that the duties of the Auditor be limited provides any limitation at all.

II. CROSS RESPONDENTS' REQUEST THAT ANY REMEDY HAVE ONLY A PROSPECTIVE EFFECT

The State Auditor shows a startling bias in favor of the initiative by asking this Court to "order the initiative placed on the ballot." Schweich Second Br. at 23. Apparently, the Auditor asks this Court to bypass the Constitutional requirement that the initiative petition contain a sufficient number of signatures as well as the statutory requirement that the Secretary of State review the signatures and the initiative for sufficiency. § 116.150, RSMo 2000. Asking this Court to order the initiative placed on

the ballot asks this Court to assume specific facts that are neither in the record, nor could be at this point in time.

The Auditor's open advocacy in favor of the initiative is inconsistent with his obligation to be impartial concerning the matter. The Auditor's request to ignore the validation process and immediately place the measure on the ballot should be ignored. "A controversy is ripe when the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a presently existing conflict, and to grant specific relief of a conclusive nature." *Foster v. State*, No. SC91341, slip op. at 5 (Mo. banc Aug. 30, 2011). That is not the case here.

Similarly Intervenors also basically ask this Court to rule on whether signatures obtained in reliance on an illegal fiscal note can be counted as valid signatures. The issue is not ripe because no one knows yet whether enough otherwise valid signatures were submitted to the Secretary of State to place the measure on the ballot. There are numerous bases currently in the law for the Secretary to reject submitted signatures. §§ 116.080, 116.100, 116.120, RSMo 2000 (unregistered circulators; official ballot title must be affixed to each page; pages must be numbered sequentially and grouped by county when submitted; person must be registered to vote in the county indicated on the signature page; struck through or crossed out signatures invalid); 15 CSR 30-15.010 (listed address outside county indicated on the signature page; name on signature page must match name on voter rolls). Accordingly, without considering this issue of the constitutionality of section 116.175, RSMo Cum. Supp. 2011, if there are not enough valid signatures, the issue is not ripe.

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Unless and until the Secretary makes her determination pursuant to section 116.150, and depending on her determination, the issue may then become ripe for adjudication. Should this Court decide to provide the Secretary with an advisory opinion as to whether to count as valid signatures any collected on signature pages that included a fiscal note summary where that fiscal note summary was based upon an unconstitutional imposition of duties on the State Auditor, Cross Appellants will take the opportunity to counter Cross Respondents' arguments.

However, should this Court take up the issue of whether a ruling on the sufficiency of the ballot title effects the signatures, the Court should ask for separate briefing on that issue as the Court has done in the past. E.g., *Trout v. State,* 231 S.W.3d 140, 148 (Mo. 2007). As discussed in *Trout,* whether a ruling applies retroactively is a complicated analysis. Supplemental Opinion, *Id.* at 148-157. It cannot be properly analyzed within the word limitations on a reply brief such as this.

Briefly, if the Court strays into advising on future situations that may or may not occur, the Court should acknowledge the impact of what Respondents request. Were the Court to simply ignore the deficiencies in the official ballot title, the Court would essentially be establishing a rule that *even if* a ballot title is insufficient and unfair, even if signers were deceived into signing the ballot initiative by a biased and unfair statement from state officials, those signatures obtained under deceptive circumstances should be counted.

As discussed in Northcott's opening brief, this would be an abandonment of procedural safeguards and a tipping over of the scale that balances the right of citizens

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who wish to enact a law against the rights of those who are opposed to the law. *Buchanan v. Kirkpatrick,* 615 S.W.2d 6 (Mo. banc 1981). It puts this Court in dangerous waters. Moreover, Appellant brought this action prior to any signatures being turned in. Intervenors went to great effort to insert themselves into the litigation and had full knowledge that Northcott and Potashnick were asking the ballot title to be set aside. Intervenors were on notice that they might be gathering signatures on a deceptive ballot title. To say that Northcott and Potashnick may not obtain relief because of delays in bringing the case to trial – which were not the fault of Plaintiffs – raises serious policy issues that should be addressed more specifically, with greater deliberation and in a scenario with a fully developed record.

The Auditor also cites an interesting passage from the dissent in *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 459 (Mo. App. 2006). Dissenting Judge Smart pointed out courts have "a pattern of allowing substantial latitude with regard to the technicalities of seeking to place an initiative measure on the ballot." Schweich's Second Br. at 26. In the opinion of counsel, Judge Smart's observation is correct if he is referring to the Western District Court of Appeals. That Court has given "substantial latitude." Interestingly though, no statute or Constitutional provision requires such latitude. The statutes do not require the Courts to show any deference at all to the Secretary of State or the State Auditor. *Contrast* Chapter 536, RSMo, limiting a

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court to review of the record below in contested cases and specifically prohibiting interference in discretionary decision in non-contested cases.[1]

This Court has not shown substantial latitude, but rather has followed the statutory requirements. This policy is in keeping with the teachings of *Buchanan v. Kirkpatrick,* which acknowledge that "wide latitude" jeopardizes the rights of citizens who are opposed to the measure. The Auditor cites to *Committee for a Healthy Future, Inc. v. Carnahan,* 201 S.W.2d 503 (Mo. banc 2006), for the proposition that this Court gives such latitude. Schweich's Second Br. at 27. *Healthy Future* broke no new ground by holding that irregular signatures should be counted unless the legislature expressly made the irregularity fatal. When it comes to the official ballot title, however, the legislature *has* specifically mandated that signatures turned in on pages that do not contain the proper official ballot title *shall not be counted.* § 116.120, RSMo 2000. Whether that statute applies or is an infringement on a Constitutional right may end up being litigated with a properly developed record in the future, perhaps even in the future of this particular initiative. For now, though, no one has challenged the validity of the statute and the Auditor's request to bypass it and place the measure on the ballot is inappropriate.

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[1] The Auditor also references the *Thompson* case where the measure was placed on the ballot with the fiscal summary removed. *Thompson* sued *after* the signatures had been turned in and validated and did not challenge the official ballot title approved for circulation for signatures. Northcott did timely sue for relief the Auditor now seeks to deny solely due to passage of time.

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CONCLUSION

Cross Appellants Peggy Northcott and Larry Potashnick respectfully request this Court to reverse the trial court's denial of a declaratory judgment that Section 116.175 violates Missouri Constitution article IV, section 13, and order the trial court to enter such a declaration together with such orders as are consistent therewith. Should this Court consider the remedy, the Court should order what Plaintiffs sought below, striking of the fiscal note summary from the official ballot title which was certified by the Secretary of State for circulation. Northcott and Potashnick properly sued in a timely manner seeking that result and the relief which should have been afforded at the time is the proper remedy to be ordered now.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned counsel certifies that on this 22nd day of June 2012, a true and correct copy of the foregoing brief was served on the following by eService of the eFiling System and a Microsoft® Office Word 2007 version was e-mailed to:

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The undersigned counsel further certifies that pursuant to Rule 84.06(c), this brief:

(1) contains the information required by Rule 55.03;

(2) complies with the limitations in Rule 84.06(b) and contains 1,944 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2007; and

(3) the Microsoft® Office Word 2007 version e-mailed to the parties has been scanned for viruses and is virus-free.

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